

No. 11,154

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK M. WEBER,

Appellant,

VS.

EVA M. WELLS, OLGA K. NEWPORT, ERNEST
H. KREYENHAGEN, JENNIE MAY MERRILL
MILLER, ALMA H. SILVA, LILLIAN ARNEY,
LOWELL HERIFORD, WALTER MERRILL and
PAUL MERRILL,

Appellees.

Upon Appeal from the District Court of the United States for
the Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

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PAUL P. O'BRIEN

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THE FACTS.

On April 4th, 1942, United States of America filed a suit in condemnation affecting certain real property in the City and County of San Francisco, State of California, adjoining Hunter's Point. The appellees were named as defendants. (Page 2, Transcript of Record.)

The City and County of San Francisco and the State of California were also named as defendants. (Page 7, Transcript of Record.)

as nearly as may be, to the practice, pleadings forms and proceedings existing at the time in like causes in the courts of record in the state within which the District Court is held, any rule of the court to the contrary notwithstanding.”

(Title 40, Section 258, USCA.)

Under the provisions of Section 258a, Title 40, U. S. C. A. the United States can take immediate possession of the property by the filing of a declaration of taking in conformity with the section. The section then provides:

“Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, *and the right to just compensation for the same shall vest in the persons entitled thereto.*”

In *Danforth v. United States*, 60 Supreme Court 231, 208 U. S. 271, 84 L. Ed. 240, an action in condemnation, the Court at pages 283 and 284 says:

“Just compensation is value at the time of the taking. The Congress in other situations has adopted the time of taking as the date for determination of value. *For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.* Citing *Kindred v. Union Pacific Railroad Company*, 325 U. S. 582

at 597; In *Roberts v. Northern Pacific Railway Company*, 158 U. S. 1, 10, the precedents are collected.”

IT WAS THE DUTY OF THE FEDERAL COURT TO WITHHOLD SUFFICIENT FUNDS FOR THE PAYMENT OF TAXES FROM THE AWARD TO THE OWNERS.

United States v. Certain Lands situated in the City of St. Louis, 51 Fed. Supp. 80 (U. S. District Court, Eastern District of Missouri, decided August 17th, 1943), the Court says, at page 82:

“When the federal government acquires the property for federal use there can be no payment or appropriation of the property for the payment of due and unpaid taxes. (Citing *U. S. v. Alabama*, 313 U. S. 274, 61 Sup. Ct. 1011, 85 L. Ed. 1327.)”

The Court then proceeds to say:

“It is the duty of the court to protect the local municipality by withholding from the fund which stands in the place of the property the amount of the tax debt.”

In *United States v. 9.94 Acres of Land in City of Charleston*, 51 Fed. Supp. 480, the Court, at page 485 says:

“In my opinion he (the owner) is entitled to receive a definite fixed payment representing the value of the property *at the time of taking*.”

The Court then goes on to say on the same page:

“The defendants point out that the county and municipal authorities are threatening to enforce

liens for taxes and assessments, and raise the question as to whether the deposits made in court should be applied to the liquidation of the same. Since I hold that the taxes and assessments are liens against the respective parcels, I am of the opinion that such deposits may be applied for such purposes.”

In *United States v. Bennett*, Eastern District of Washington, Northern District, 57 Fed. Supp. 670, the Court at page 673 says:

“The determination of the person entitled to compensation out of the award must be made as of November 16th, 1942, the date of the filing of the declaration of taking ‘For the reason that compensation is due at the time of taking the owner at that time, not the owner at an earlier or a later date, receives the payment’. *Danforth v. U. S.*, 308 U. S. 271, 284, 60 S. Ct. 231, 236, 84 L. Ed. 240. The award stands in the place of the property. *Washington Water Power Co. v. U. S.*, 9 Cir. 135 Fed. 2d. 541.”

And at page 674, the Court says:

“The statute U. S. C. A. 258a provides: ‘The court shall have power to make such orders in respect to liens and encumbrances * * * and other charges, if any, as shall be just and equitable’. * * * The Swansons are entitled to any portion of the award in excess of the amount of the mortgage judgment.”

In *Meadows v. U. S.*, 144 Fed. (2d) 751, the Court at page 753 says:

“The value of property once determined in a proper proceeding, the sum so determined stands in the place of the property and can be dis-

tributed upon the adjudication of the value of the respective interests. U. S. v. Dunnington, 146 U. S. 338, 13 S. Ct. 79, 36 L. Ed. 996, Monongahela Navigation Co. v. U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463.”

United States v. 150.9 Acres of Land, more or less, in Milwaukee County, Wisconsin, 135 Fed. (2d) 878. The Court in discussing the effect of liens against property at the time of the declaration of taking states, at page 880 says:

“The fair market value paid into court took the place of the property, and liens, if any, attached to the fund.

U. S. v. Dunnington, 146 U. S. 338, 351, 13 S. Ct. 79, 36 L. Ed. 996. *People of Puerto Rico etc. v. U. S.*, 1 Cir., 134 Fed. 2d. 267, 271. U. S. v. *Certain Lands in Brooklyn*, 2 Cir. 129 Fed. 2d. 577, 579. *Cobo v. U. S.* 6 Cir. 94 Fed. 2d. 351, 352. U. S. v. *Certain Parcels of Land D. C.* 44 Fed. Supp. 936, 937. We think it clear, therefore, that the United States was not liable, nor was the property after it had been taken.”

In *Empie v. United States*, C. C. A. 4th Cir. 131 Fed. (2d) 481, the Court says, at page 483:

“The general rule is that compensation for property taken in the exercise of the power of eminent domain is due to the owner at the time of taking and not to the owner at an earlier or later date, *Danforth v. U. S.*, 308 U. S. 271, 284, 60 S. Ct. 231, 84 L. Ed. 240, *Roberts v. N. Pac. R. R.* 158 U. S. 1, 10, 15 S. Ct. 756, 39 L. Ed. 873. *Kindred v. U. P. R. Co.* 225 U. S. 582, 597, 32 S. Ct. 780, 56 L. Ed. 1216. *Empie* bases his claim on this rule.”

THE LAW OF THE STATE OF CALIFORNIA IS APPLICABLE
AS TO THE PAYMENT OF COMPENSATION.

The principle that the right to compensation shall be determined in accordance with the laws of the state in which the proceedings are instituted has been enunciated in the case of *Empie v. United States of America*, 131 Fed. (2d) 481 (C. C. A. N. C. 1942.)

Under the law of the State of California the right to compensation for the taking of private property is a personal one, and such compensation must be paid to the owners as their respective interests appear at the time when the taking of the property for a public use is deemed to occur.

The Supreme Court of the State of California, on September 19th, 1944, in the case of *The People v. Klopstock*, 24 Cal. (2d) 897 at 902, 24 A. C. 889 at 894, enunciates the same principle, where it is said:

“The state Constitution (art. I, Sec. 14) provides that compensation for the taking of private property shall be paid to the owners. In fixing awards in condemnation cases compensation must be paid to the owners as their respective interests shall appear at the time when the taking of property for a public use is deemed to occur—at the date of the issuance of summons. (Code Civ. Proc., Sections 1248, 1249; *Brick v. Cazaux*, 9 Cal. 2d 556 (71 P. 2d 588); *City of Los Angeles v. Blondeau*, 127 Cal. App. 139, 140 (15 P. 2d. 554); *People v. Joerger*, 12 Cal. App. 2d. 665, 671 (55 P. 2d. 1269).)”

In *Towne v. City of Los Angeles*, 4 Cal. App. (2d) 418 at 420, the Court says:

“The award is payable to the one who owns the property at the time it is taken in the condemnation proceedings. Plaintiff became entitled to the award when the interlocutory decree became final. Title passed to the public when the interlocutory judgment was entered and the money paid into court. C. C. P. 1253. *McDaniels v. Dickey*, 219 Cal. 89.”

In *Russakov v. McCarthy Co.*, 206 Cal. 682 (275 Pac. 808) it is said at page 686:

“That a person, to be entitled to moneys awarded as compensation for the condemnation of property, must establish an interest or estate in the thing condemned, is, as an abstract proposition of law unquestionably sound. *But the right to compensation is a personal one which does not run with the land, and does not pass to a vendee of the land after the right accrues* in the absence of an express agreement to that effect.”

There can be no question but what the title to the real property at the time of the filing of the suit and the judgment of declaration of taking was vested in the owners as set forth above. The fact that a sale to the State of California was made in June, 1937, did not deprive the owners of their title. The title remained in the owners, subject to the lien in favor of the state, created by the assessment and tax levy. Prior to the expiration of the five year period of redemption title to the property was taken by United States and the right to compensation for such taking immediately vested in the then owners of the property, subject only to the payment to the City and County

CONCLUSION.

Under the authorities heretofore cited by appellees, it is submitted that these appellees are entitled to the award made by the lower Court, and that the appellant had no interest in the real property or in the award at the time of the declaration of taking; that the City and County of San Francisco was without jurisdiction to direct a sale of the real property after the judgment of declaration of taking, and the appellant acquired no rights in the award by the purchase of the real property at the tax sale.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco,
February 20, 1946.

ROYAL E. HANDLOS,
Attorney for Appellees.